A

UTUSAN MELAYU (M) BHD v. LIM GUAN ENG

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
B [CIVIL APPEAL NO: P 02-1729-07-2012]
14 AUGUST 2015

TORT: *Defamation – Libel – Article published in newspaper – Based on plaintiff's speech – Allegation that words in article carried meaning that plaintiff wished to* C *abolish New Economic Policy – Ordinary and usual sense of words in article – Interpretation of phrase – Whether words must be taken in isolation or as a whole – Whether article defamatory – Whether would incite hatred among various races in Malaysia*

D The appellant ('the defendant') had published an article based on the respondent's ('the plaintiff') speech with the heading 'DEB Guan Eng Tetap Berdegil' ('the article'). According to the plaintiff, the article contained words which, in its ordinary and usual sense, carried the meaning that the plaintiff, *inter alia*, (i) wished to abolish the New Economic Policy in Pulau Pinang ('menghapuskan DEB'); and (ii) was a politician with the malicious E intent to incite hatred between various races in Malaysia. In his claim at the High Court for general, aggravated and exemplary damages against the defendant, the plaintiff submitted that the publication of the article was defamatory and had injured his reputation. The defendant argued that the article was written and published in good faith without any malice and F pleaded, in the alternative, for the defence of fair comment and qualified privilege. The Judicial Commisioner ('the JC'), in holding the article to be defamatory, found the publication that the plaintiff intended to 'menghapuskan DEB' would incite the hatred and contempt of the Malays. The defendant's defence of fair comment and qualified were rejected. Hence, G the present appeal.

Held (allowing appeal with costs; setting aside decision of High Court) Per Badariah Sahamid JCA delivering the judgment of the court:

(1) The article was published in Bahasa Malaysia in a Malay language newspaper. Since Bahasa Malaysia is the national language and widely H used as a medium of communication, it would be fair to assume that those who read the Utusan and the article are not merely confined to Malays but non-Malays as well. (para 27)

(2) In construing the meaning of the impugned words, the sense in which I the words were intended by the plaintiff or defendant was not a relevant factor. Linguistic analysis of the phrases is not necessarily reflective of what is ordinarily understood by the reasonable person. A reasonable

reader would be focused more on the likely effect of the different terminologies and not the niceties of the terminologies employed, including the degree of gravity attached to the words. (paras 33 & 37)

(3) In construing whether the impugned words are defamatory or not, the words must not be taken in isolation but must be construed as a whole. The words "menghapuskan DEB" in the article, in its ordinary and usual meaning, refers to a verb – a description of the intended action of the plaintiff. Reference was made to a paragraph in the article that the plaintiff "sedia mendengar semua rakyat termasuk yang datang dari UMNO" and the concluding paragraph where the plaintiff stated "saya ingin menegaskan bahawa kerajaan baru ini akan bertindak adil kepada semua rakyat". Thus, the words in the article were not defamatory according to established principles. (paras 39, 40 & 41)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('defendan') telah menerbitkan satu rencana berdasarkan ucapan responden ('plaintif') dengan tajuk 'DEB Guan Eng Tetap Berdegil' ('rencana tersebut'). Menurut plaintif, rencana tersebut mengandungi kata-kata yang, dalam tafsiran biasa dan semulajadinya, bermaksud plaintif, antara lain, (i) ingin menghapuskan Dasar Ekonomi Baru di Pulau Pinang; dan (ii) seorang ahli politik yang berniat jahat untuk mengapi-apikan kebencian antara pelbagai kaum di Malaysia. Dalam tuntutannya di Mahkamah Tinggi bagi ganti rugi am, teruk dan teladan terhadap defendan, plaintif menghujahkan bahawa penerbitan rencana tersebut bersifat memfitnah dan menjejaskan reputasi beliau. Defendan menghujahkan bahawa rencana tersebut ditulis dan diterbitkan dengan suci hati tanpa apa-apa niat jahat dan memplidkan, secara alternatif, pembelaan ulasan saksama dan perlindungan bersyarat. Pesuruhjaya Kehakiman ('PK') dalam memutuskan bahawa rencana tersebut bersifat memfitnah, mendapati penerbitan bahawa plaintif berniat untuk "menghapuskan DEB" membangkitkan kebencian dan cemuhan oleh orang Melayu. Pembelaan ulasan saksama dan perlindungan bersyarat oleh defendan ditolak. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Tinggi)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Rencana tersebut diterbitkan dalam Bahasa Malaysia, dalam akhbar bahasa Melayu. Memandangkan Bahasa Malaysia ialah bahasa kebangsaan dan digunakan secara meluas sebagai perantara komunikasi, adalah adil untuk menganggap bahawa orang yang membaca Utusan dan rencana tersebut tidak terbatas kepada orang Melayu sahaja tetapi juga orang bukan Melayu.

(2) Dalam mentafsirkan maksud kata-kata yang dipertikaikan, maksud kata-kata yang diniatkan oleh plaintif atau defendan bukanlah faktor relevan. Analisis linguistik frasa tidak semestinya mencerminkan apa yang kebiasaannya difahami oleh seorang yang munasabah. Seorang pembaca munasabah akan lebih fokus kepada kesan mungkin terminologi yang berbeza-beza dan bukan perbezaan-perbezaan kecil terminologi yang digunakan, termasuk keseriusan kata-kata tersebut.

(3) Dalam mentafsirkan sama ada kata-kata yang dipertikaikan bersifat memfitnah atau tidak, kata-kata tersebut tidak boleh diambil secara berasingan tetapi mestilah ditafsirkan secara keseluruhan. Kata-kata 'menghapuskan DEB' dalam rencana tersebut, dalam maksud biasa dan semulajadinya, merujuk pada satu kata kerja – satu gambaran tindakan yang diniatkan oleh plaintif. Rujukan dibuat pada satu perenggan dalam rencana bahawa plaintif "sedia mendengar semua rakyat termasuk yang datang dari UMNO" dan perenggan penutup di mana plaintif mengatakan "saya ingin menegaskan bahawa kerajaan baru ini akan bertindak adil kepada semua rakyat". Oleh itu, kata-kata dalam rencana tersebut tidak bersifat memfitnah berdasarkan prinsip-prinsip mapan.

Case(s) referred to:

Al-Fagih v. HH Saudi Research and Marketing (UK) [2002] EMLR 13 ***(dist)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
Parmiter v. Coupland and Another (1840) 6 M & W 105 ***(refd)***
Sim v. Stretch [1936] 2 All ER 1237 ***(refd)***
Slim v. Daily Telegraph Ltd [1968] 1 All ER 497 ***(refd)***
Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Legislation referred to:

Defamation Act 1957, s. 12

For the appellant - Mohana Kumar TK Balakrishnan (Rohanidah Shafie with him); M/s Shafie & Mohan
For the respondent - Jeremy Vinesh Anthony Jeyakumar; M/s Karpal Singh & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-172-2009]

Reported by Najib Tamby

JUDGMENT

Badariah Sahamid JCA:

[1] This is an appeal against the decision of the High Court of Pulau Pinang which allowed the plaintiff's claim in defamation against the defendant. The learned Judicial Commissioner (JC) also awarded damages of RM200,000 and costs of RM20,000 to the plaintiff. This appeal before us is against liability as well as the quantum of damages.

Brief Background Facts

[2] The plaintiff was at all material times the Chief Minister of Pulau Pinang. The defendant was at all material times the publisher of a Malay language daily known as 'Utusan Malaysia'.

[3] On 8 March 2008, Pakatan Rakyat took over the governance of the state of Penang. The plaintiff was appointed the new Chief Minister of Penang on 11 March 2008. On the same day, the plaintiff held a press conference to deliver his maiden speech as the new Chief Minister of Penang. The speech referred to several aspects of the governance of Penang. The plaintiff's maiden speech was widely reported by online as well as print media. Exhibit P1 is a reproduction of the text of the plaintiff's reported speech:

> We will run the government administration free from the New Economic Policy (NEP) that breeds cronyism, corruption and systematic inefficiency. We will implement an open tender system for all government procurement and contracts.

[4] On 15 March 2008, the defendant had published an article with the heading, "DEB Guan Eng Tetap Berdegil". The impugned article is reproduced below:

> 1. Ketua Menteri Lim Guan Eng kesal dengan tindakan kira-kira 3,000 orang dari pelbagai pertubuhan bukan kerajaan (NGO) dan penyokong UMNO yang mengadakan demonstrasi di perkarangan Komtar di sini hari ini.
> 2. Demonstrasi secara aman yang tidak melibatkan sebarang tangkapan atau kecederaan itu dibuat bagi menyatakan bantahan mereka terhadap DAP yang mahu menghapuskan Dasar Ekonomi Baru (DEB) di Pulau Pinang dalam pemerintahannya.
> 3. Sambil menegaskan akan tetap dengan pendiriannya untuk menghapuskan DEB di Pulau Pinang walaupun mendapat bantahan pelbagai pihak. "Demonstrasi tersebut hanya menyusahkan rakyat Pulau Pinang."
> 4. "Saya terkejut dan kesal dengan tindakan (demonstrasi) yang telah dibuat kerana tiada sebarang memorandum disampaikan kepada kami. Bagaimanapun pendirian saya tidak akan berubah seperti yang saya sebut pada hari pertama menjadi Ketua Menteri.
> 5. Kalau mereka ingin menyampaikan pandangan ia boleh dibuat dengan cara yang lebih baik dan betul iaitu menghantar memorandum atau berjumpa dengan saya.
> 6. Saya sedia mendengar suara semua rakyat termasuk yang datang dari UMNO.Tetapi hari ini saya sendiri tidak tahu apa tujuan mereka selain menyusahkan rakyat", katanya.

A

7 Beliau berkata demikian kepada pemberita selepas menerima kunjungan hormat Penasihat Parti Keadilan Rakyat (PKR), Datuk Seri Anwar Ibrahim di pejabatnya, di Tingkat 28, Komtar di sini. Turut hadir Penasihat DAP, Lim Kit Siang.

8. Guan Eng juga menyifatkan usaha pemimpin UMNO negeri mengadakan demonstrasi untuk menjejaskan dan menjatuhkan pentadbiran kerajaan pimpinannya juga tidak akan berjaya.

B

9. Menurut beliau, pemimpi-pemimpin tersebut perlu menerima bahawa mereka telah kalah dan tidak dipilih oleh rakyat.

10. Demonstrasi ini dibuat cuma ingin mengalihkan pandangan kita daripada masalah dalaman yang mereka hadapi. Saya minta mereka hormatilah keputusan rakyat yang telah memilih kami pada Pilihan Raya Umum 8 Mac lalu.

C

11. Saya ingin menegaskan bahawa kerajaan baru ini akan bertindak adil kepada semua rakyat, kata Guan Eng.

D

Plaintiff's Statement of Claim

[5] The plaintiff's cause of action against the defendant is premised on the tort of defamation arising from the published article abovementioned.

[6] The impugned words in the said article appear in para. 3 as

E

reproduced below:

> 3. "Sambil menegaskan akan tetap dengan pendiriannya untuk menghapuskan DEB di Pulau Pinang Walaupun mendapat bantahan pelbagai pihak Demonstrasi tersebut hanya menyusahkan rakyat Pulau Pinang."

F

[7] The plaintiff claims that the impugned words in its ordinary and usual sense carry the following meaning:

(i) the plaintiff wished to abolish the New Economic Policy in Penang;

(ii) the plaintiff is a criminal who had committed an action which had seditious tendencies punishable under the Sedition Act 1948;

G

(iii) the plaintiff is a politician who maliciously intended to incite hatred between the various races in Malaysia; and

(iv) the plaintiff is irresponsible, negligent and is not qualified to hold public office as Chief Minister, Member of Parliament and State Assemblyman.

H

[8] The plaintiff claims that as a consequence of the publication of the impugned words in the article, the plaintiff has been seriously defamed and the words had brought the plaintiff into public contempt and ridicule and caused the plaintiff to suffer injury to his reputation.

I

[9] The plaintiff claims the defendant had not verified the truth of the impugned words published and had acted recklessly. The defendant did not tender any apology and had acted with unadulterated malice with the intention to destroy the plaintiff's political career.

[10] Thus the plaintiff claims for general damages, aggravated and exemplary damages for the libellous article published by the defendant.

Defence

[11] The defendant pleaded the following in defence:

(i) the contents of the impugned article was written by a journalist of the defendant, Rokiah Abdullah, based on statements made at a press conference on 14 March 2008 at the 28th Floor, Bangunan Komtar, Pulau Pinang, held by the plaintiff as Chief Minister;

(ii) the words in the impugned article in its usual and ordinary meaning taken in the context of the article as a whole are not defamatory;

(iii) the impugned article was written and published in good faith premised *inter alia* on the press conference and without any malice towards the plaintiff;

(iv) in addition or in the alternative, if the words in the impugned article are defamatory, the defence of "fair comment" applies in that the impugned words were made honestly, without any malice and on a matter of public interest; and

(v) in addition, the impugned article is protected by qualified privilege pursuant to s. 12 of the Defamation Act 1957.

Issues

[12] The issues for determination before the High Court may be summarised thus:

(a) Whether the impugned words were defamatory?

(b) If the impugned words were defamatory, whether the defendant can rely on the defence of fair comment or in the alternative or in addition thereto, the defence of qualified privilege?

Decision Of The High Court

[13] The learned JC made a finding that the words in the impugned article, in particular that the plaintiff would, "menghapuskan DEB di Pulau Pinang", had satisfied the three essential elements of defamation ie:

(i) the words referred to the plaintiff;

(ii) the words were published to third parties; and

A (iii) the words were defamatory in that they had the tendency to lower the reputation of the plaintiff as Chief Minister and politician in the eyes of reasonable persons.

[14] The learned JC found that the defendant had acted with malice as the plaintiff's original text at the press conference (exh. P1) was in the following terms:

B

> We will run the government administration **free from the New Economic Policy (NEP)** that breeds cronyism, corruption and systematic inefficiency ... (emphasis added)

C **[15]** However, the defendant's journalist had failed to verify the accuracy of the plaintiff's statement as published in the defendant's daily.

[16] The learned JC referred to "Kamus Besar Bahasa Melayu" and compared the meanings attached to the word "menghapuskan" compared to the word, "bebas dari". The usage of the word "menghapuskan" by the D defendant is an incorrect translation of the English equivalent of "free from" which should have been translated as "bebas dari". The words "menghapuskan" carry serious connotations in a multiracial society:

> ... pembaca akhbar utusan Melayu khasnya masyarakat Melayu sudah pasti akan marah, benci dan dendam kepada Plaintif yang sewenang-E wenangnya mahu menghapuskan DEB yang menjadi dasar nasional sejak tahun 1970 yang mana melibatkan hak-hak orang Melayu.

[17] The learned JC rejected the defendant's contention on the premise that the words "menghapuskan DEB" was seriously damaging to the plaintiff to the extent that the damage was not alleviated by the concluding paragraph F of the impugned article.

[18] The learned JC rejected the defendant's defence of fair comment on the grounds that the failure of the defendant to verify the accuracy of the statement made by the plaintiff demonstrates that the defendant had not acted honestly and was malicious in the publication of the impugned article.

G

[19] The learned JC also rejected the defence of qualified privilege on the premise that the defendant had failed to demonstrate the prerequisites that the impugned article was a "fair and accurate" report of the statement made by the plaintiff at the press statement. The words used "menghapuskan DEB" was inaccurate.

H

[20] The learned JC had made a finding of malice against the defendant, which defeated the defence of fair comment and qualified privilege.

[21] The learned JC took into consideration the plaintiff's position as Chief Minister of Pulau Pinang and that the impugned article was published in a I leading Malay daily with a wide circulation, and awarded the plaintiff global damages of RM200,000, costs of RM20,000 and post judgment interest of 4%.

Findings And Decision On Appeal

[22] After careful consideration of written and oral submissions of counsel, appeal records as well as relevant authorities, we are of the considered opinion that the impugned words are not defamatory. Thus, there is no necessity to consider the defences raised by the appellant. We therefore allow this appeal with costs. The grounds of our decision are stated below.

[23] The tort of defamation raises a number of difficult issues. Courts have had to grapple with the competing issues of freedom of expression and protection of claimant's reputation. This is particularly true in the context of the freedom of the press to publish material for public information and dissemination and the right of individuals to be protected from publication which is damaging to their reputation.

[24] It is not disputed that the impugned article refers to the plaintiff and there was publication of the impugned article, thus satisfying two of the three elements of the tort of defamation. The critical issue is whether the words in the impugned article are defamatory.

Were The Words In The Impugned Article Defamatory?

Who Are The Right Thinking Members Of Society?

[25] While there is no exhaustive definition of "defamatory", several cases have laid down that a defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt or ridicule, or which tends to lower him in the esteem of right thinking members of society. (*Parmiter v. Coupland and Another* (1840) 6 M & W 105; *Sim v. Stretch* [1936] 2 All ER 1237; *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393)

[26] The "right thinking members of society" is essentially the objective standard of the "reasonable person" which is applied by courts. An interesting issue which arises in this case is whether the "right thinking members of society" is from a particular community or from society generally? The position taken by the learned JC appears to be from the perspective of the Malay community. The learned JC in finding the impugned article to be defamatory referred to the publication that the plaintiff intended to "menghapuskan DEB" would incite the hatred and contempt of the Malays - not the community in general:

> Pada pendapat saya, pembaca akhbar Utusan Melayu khasnya masyarakat Melayu sudah pasti akan marah, benci dan dendam kepada Plaintif yang dengan sewenang-wenangnya mahu menghapuskan DEB yang menjadi dasar nasional sejak tahun 1970 yang mana melibatkan hak-hak orang Melayu.

[27] In the instant case, the impugned article was published in Bahasa Malaysia in a Malay language daily. Are the right thinking members of society comprised of the Malays only or does it refer to a wider section of society who may not be Malays. Since Bahasa Malaysia is the national language and widely used as a medium of communication, it would be fair to assume that those who read the Utusan and the impugned article are not merely confined to Malays but non-Malays as well.

[28] The above contention is significant in the light of the judge's finding that the readers of Utusan Melayu, in particular, the Malay community would regard the plaintiff with contempt and ridicule.

[29] From the decided cases, society would appear to mean society as a whole and not merely a section of the community or a particular race. In the classic case of *Sim v. Stretch* [1936] 2 All ER 1237, statements were held to be defamatory when they "tend to lower the plaintiff in the estimation of right thinking members of society generally" [1936] 2 All ER 1237 at 1240, HL per Lord Atkin.

[30] The case of *Al-Fagih v. HH Saudi Research and Marketing (UK)* QBD, 28 July 2000 unreported [2002] EMLR 13 may be distinguished. In that case the offending article was published in Arabic. The court took into consideration the sensibilities of the Muslim society in which allegations of a sexual nature, especially when made against women was capable of a defamatory meaning. However, that case can be distinguished from the instant case in that the court took the view that the reputation of a person within his or her religious community may be damaged by a statement which would not be regarded as damaging to a society generally.

[31] In the instant case, it is arguable that the impugned article may have had the contrary effect of raising the plaintiff's esteem and repute in the eyes of the society in general. This is because the DEB is premised on the policy of affirmative action in favour of a section of a community (Bumiputera). Thus, the publication of the Chief Minister's statement to do away with DEB in order to implement an equitable system may be regarded positively by right thinking members of society generally.

The Natural And Ordinary Meaning Of Words

[32] In para. 5 of the statement of claim, the plaintiff claims that the impugned words in its ordinary and usual sense carry the following meaning:

(i) the plaintiff wished to abolish the New Economic Policy in Penang;

(ii) the plaintiff is a criminal who had committed an action which had seditious tendencies punishable under the Sedition Act 1948;

(iii) the plaintiff is a politician who maliciously intended to incite hatred between the various races in Malaysia; and

(iv) the plaintiff is irresponsible, negligent and is not qualified to hold public office as Chief Minister, Member of Parliament and State Assemblyman.

[33] What meaning should be ascribed to the impugned words? In construing the meaning of the impugned words the sense in which the words were intended by the defendant is not a relevant factor. The sense in which the words were understood by the plaintiff is also irrelevant. Neither is a linguistic analysis of the phrases used necessarily reflective of what is ordinarily understood by the reasonable person. (*Slim v. Daily Telegraph Ltd* [1968] 1 All ER 497 at p. 504 A-B per Diplock LJ (as he then was)

[34] In the case of *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393, Richard Malanjum J (as he then was) had stated:

> The approach in the construction of words complained of is to consider the meaning such words would convey to ordinary reasonable person using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw.

[35] Thus, in the instant case, we are of the opinion that the learned JC had misdirected herself in undertaking a linguistic analysis of the impugned phrase "menghapuskan" as compared to the word "bebas". In her grounds of judgment, paras. 37(a-c), the learned JC had painstakingly analysed the dictionary meaning of the word "menghapuskan" from no less than three different dictionaries: Kamus Besar Bahasa Melayu Utusan, Kamus Lengkap and Kamus Dewan Edisi Keempat.

[36] From the analysis, she concluded thus:

> Setelah meneliti maksud perkataan "menghapuskan" dan perkataan "bebas" Mahkamah ini setuju dengan hujahan Plaintif bahawa perkataan "menghapuskan" adalah lebih berat maknanya dari perkataan "bebas" dan seharusnya tidak digunakan oleh Defendan terutamanya dalam konteks masyarakat majmuk Malaysia dimana sekiranya perkataan yang berat sebegitu digunakan, ia sudah tentu akan menyebabkan ketegangan sentiment antara kaum Melayu dan bukan Melayu khasnya dalam isu DEB.

[37] The ordinary reader is no linguist, nor inclined to make a comparative dictionary meaning of the terminology "menghapuskan" as compared to "bebas dari". A reasonable ordinary reader, in our opinion, would be focused more on the likely effect of the different terminologies-not the niceties of the terminologies employed, including the degree of gravity attached to the words, as contended by the learned High Court Judge. The effect of "menghapuskan" is the same as "bebas dari", that is the absence of the operation of DEB in Penang – which it is not disputed was announced by the plaintiff himself at a press conference on 14 March 2008 and reported in the press.

Imputation Of Dishonourable Conduct Or Lack Of Integrity

[38] In the case of *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461; [1999] 1 AMR 753, Gopal Sri Ram JCA (as he then was) offered the following test to determine whether a statement is defamatory:

> ... the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the Plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[39] It is well established by authorities that in construing whether the impugned words are defamatory or not, the impugned words must not be taken in isolation but must be construed as a whole. The words in the impugned article "menghapuskan DEB" in its ordinary and usual meaning refers to a verb – a description of the intended action of the plaintiff. The article also expressly states the reason for the plaintiff's action was to address the inequitable position brought about by the operation of the DEB. How then by any stretch of meaning can this be read to impute that the intended action of the plaintiff demonstrates, "dishonourable or discreditable conduct or motives or a lack of integrity" on the plaintiff's part?

[40] In this respect, reference was made to para. 6 of the impugned article that reported that the plaintiff, "sedia mendengar suara semua rakyat termasuk yang datang dari UMNO," as well as the concluding paragraph which reported the plaintiff as saying," Saya ingin menegaskan bahawa kerajaan baru ini akan bertindak adil kepada semua rakyat, kata Guan Eng".

[41] Thus it is our considered opinion that the words in the impugned article are not defamatory according to established principles applied in the case laws mentioned. We therefore allow the appellant's appeal with costs and set aside the decision of the learned JC.